

What's "Different" (Enough) in Eighth Amendment Law?

Richard S. Frase*

In *Miller v. Alabama*¹ and *Jackson v. Hobbs*² the Supreme Court reaffirmed its conclusions in two earlier cases, *Roper v. Simmons*³ and *Graham v. Florida*,⁴ that “children are constitutionally different from adults for purposes of sentencing”⁵ in ways that justify greater Eighth Amendment protection from severe sentences. *Miller* and *Jackson* (hereafter referred to for most purposes as *Miller*) also reaffirmed the Court’s conclusion in *Graham* that, although “death is different” for purposes of Eighth Amendment law, some of the substantive and analytic principles previously applied only in death penalty cases can also be applied to the most severe prison sentence, life without possibility of parole [LWOP].⁶ Thus, *Graham* held that at least some LWOP sentences can be invalidated using the categorical (all-cases-of-this-type) approach that the Court had previously applied only in death penalty cases.⁷ Before *Graham*, all challenges to prison sentences were as-applied-to-these-facts, and the standards, first announced in *Solem v. Helm*⁸ and later modified in *Harmelin v. Michigan*⁹ and *Ewing v. California*,¹⁰ were almost impossible for defendants to meet. *Graham* essentially held that, although death is different, so is LWOP, at least for juveniles convicted of nonhomicide crimes.¹¹ In *Miller* the majority likewise took a categorical approach (without identifying that as a threshold issue), and likewise

* Richard S. Frase is the Benjamin N. Berger Professor of Criminal Law at the University of Minnesota.

¹ 132 S. Ct. 2455 (2012).

² 132 S. Ct. 548 (2011).

³ 543 U.S. 551 (2005).

⁴ 130 S. Ct. 2011 (2010).

⁵ *Miller*, 132 S. Ct. at 2464.

⁶ *Graham*, 130 S. Ct. at 2015–17.

⁷ *Id.* For further discussion of *Graham*, and the ways in which its categorical standards differ from and are easier for defendants to meet than the as-applied standards previously used in challenges to severe prison sentences, see Richard S. Frase, *Graham’s Good News—And Not*, 23 FED. SENT’G REP. 54 (2010).

⁸ 463 U.S. 277, 292–93 (1983).

⁹ 501 U.S. 957 (1991).

¹⁰ 538 U.S. 11 (2003). See *infra* notes 110–13 and accompanying text for further discussion of *Solem*, *Harmelin*, and *Ewing*.

¹¹ *Graham*, 130 S. Ct. at 2015–17 (2010).

recognized that juveniles are different.¹² But *Miller* also applied a further “different” factor that was held to justify striking down juvenile LWOP sentences even for homicide crimes: the challenged sentence was mandatory (a “different” factor previously applied only to the death penalty).¹³

So—what else are courts likely to view as “different” (enough) to justify closer Eighth Amendment scrutiny? Clearly, given *Roper*, *Graham*, and *Miller*, courts are most likely to expand Eighth Amendment protections so as to invalidate *non-mandatory* LWOP sentences imposed on juveniles in adult court, invoking one or more of the additional categorically-different factors that were previously applied only in death penalty cases (e.g., low-culpability felony-murder accomplices).¹⁴ The various recognized or emerging “different” factors could very well also combine in ways that support invalidating some transferred-juvenile sentences less severe than LWOP, particularly when the sentence is mandatory.

In the remainder of this essay I will say very little about juveniles other than to suggest applications of reduced-culpability analysis to adults with similar attributes. I also will not discuss the possibility that *Graham* and *Miller* could lead to broader (or narrower) limitations on death sentences.¹⁵ Instead, I want to focus on adult offenders and severe prison sentences, in light of all the other things the Court has held to be “different” enough, when combined with other “different” factors, to justify Eighth Amendment prohibition. Besides the death penalty and juvenile offenders, the list of recognized “different” factors now includes:

- LWOP¹⁶
- nonhomicide crimes of conviction (death is different on the offense side, too)¹⁷
- low-culpability felony-murder accomplices¹⁸
- mentally retarded offenders¹⁹
- mandatory penalties²⁰

¹² *Miller v. Alabama*, 132 S. Ct. 2455, 2457–60 (2012).

¹³ *Id.*

¹⁴ *See Enmund v. Florida*, 458 U.S. 782, 788–89, 801 (1982).

¹⁵ For discussion of these possibilities, see Carol S. Steiker & Jordan M. Steiker, *Graham Lets the Sun Shine In: The Supreme Court Opens a Window Between Two Formerly Walled-Off Approaches to Eighth Amendment Proportionality Challenges*, 23 FED. SENT’G REP. 79, 82 (2010).

¹⁶ Besides *Graham* and *Miller*, *Solem v. Helm*, 463 U.S. 277, 297 (1983), also implicitly recognized the particular severity of LWOP sentences, using that factor to distinguish an earlier case, *Rummel v. Estelle*, 445 U.S. 263 (1980), involving a life-with-parole sentence. In *Graham*, the majority quoted and reaffirmed *Solem’s* view of the almost-like-death severity of an LWOP sentence. *Graham*, 130 S. Ct. at 2027–28.

¹⁷ *See id.* at 2034; *Kennedy v. Louisiana*, 554 U.S. 407, 412–13 (2008); *Coker v. Georgia*, 433 U.S. 584, 600 (1977).

¹⁸ *See Enmund*, 458 U.S. at 788–89.

¹⁹ *See Atkins v. Virginia*, 536 U.S. 304 (2002).

In light of this diverse and seemingly still-growing list of "different" factors, I will argue that *Miller* may turn out to be more than "only a juvenile case," and may lead to further applications of categorical analysis in the same way that *Roper* and *Graham* did—*Roper*'s treatment of juveniles made it more than "just a death penalty case" (even though death is still different), and *Graham*'s treatment of LWOP sentences was subsequently extended to offenders convicted of homicide crimes (even though death is different on the offense side).

I will examine two broad routes for potential expansion of the Court's "that's-different" analysis. Part I examines the prospects for successful categorical challenges to adult LWOP sentences. Part II adopts the working assumption that as-applied (*Solem-Harmelin-Ewing*) analysis will remain the sole method for challenging adult prison sentences. But I argue that, in a number of ways, the expanded "that's-different" analysis suggested in the Court's recent categorical-analysis cases may suggest new grounds for Eighth Amendment relief in as-applied challenges.

I. CAN SUCCESSFUL CATEGORICAL CHALLENGES BE MADE TO SEVERE ADULT PRISON SENTENCES?

It could be argued that, in light of *Graham* and *Miller*, the majority of justices now have a preference for categorical analysis of Eighth Amendment challenges, at least when enough "differents" are present. Such a preference might, in turn, suggest a willingness to respond favorably to additional challenges of this type, even in adult cases. But why should such "differents" call for more protective, categorical analysis? I will argue that the Court properly applies such analysis whenever, due to penalty severity and other factors, as-applied analysis poses an unacceptable risk of failing to detect and prevent constitutionally-forbidden disproportionate punishment. In this sense, the choice of categorical analysis is analogous to the application of strict scrutiny in Equal Protection and First Amendment cases—more protective standards are deemed necessary in certain contexts. Categorical analysis also has several other advantages: it is easier for courts to apply and produces more consistent results.

The contrary view of *Graham* and *Miller* is that the Court really had no choice but to apply categorical analysis, and thus expressed no preference for that approach. Moreover, at least the more cautious justices will hesitate to approve any expansion of this approach to adult cases unless some principles can be derived to help the Court decide when enough "differents" are present. And if the categorical approach is to be favored, or at least expanded to new contexts, how

²⁰ See *Miller v. Alabama*, 132 S. Ct. 2455, 2455 (2012); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion); see also *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (holding that the Eighth and Fourteenth Amendments "require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death" (footnotes omitted)).

exactly will it be defined? Justice Kagan's majority opinion in *Miller* follows a different analytical path than *Graham* and the earlier death penalty decisions, and says very little about why it is doing so.²¹ Her opinion, and Justice Kennedy's in *Graham*, also make no mention of the underlying "gross disproportionality" standard that previously governed prison sentences, and at one time was also applied to capital punishment.²² Why is that?

These issues will be addressed below, as follows. Section A considers whether there is, or should be, a preference for categorical adjudication, even if that will not and cannot become the Court's exclusive approach. Section B examines the manner in which categorical analysis was applied in *Graham* and *Miller*, and the implications for future applications of this approach. Section C briefly reviews the Court's prior cases granting Eighth Amendment relief, and argues that they fall into a pattern suggesting a set of principles to guide the Court and lower courts in future categorical challenges. Section D considers whether there are now five votes to overrule *Harmelin* on its facts (mandatory LWOP for a nonhomicide crime, imposed on an adult first offender). Section E argues that even if *Harmelin* will not be overruled on its facts, that case should not prevent courts from recognizing further categorical limits in adult non-capital sentencing—including cases similar to *Harmelin*, but with additional "different" factors.

A. Is There—or Should There Be—a Preference for Categorical Eighth Amendment Standards?

Miller is a categorical, all-cases-of-this-type ruling, explicitly modeled after *Graham*, *Roper*, and the Court's earlier cases imposing substantive limits on death penalty eligibility.²³ But unlike Justice Kennedy's majority opinion in *Graham*, Justice Kagan's *Miller* opinion did not begin by explaining and justifying the choice of a categorical approach.²⁴ Perhaps she simply assumed that, since *Graham* had applied categorical analysis to an LWOP penalty, the Court must take the same approach in addressing the LWOP penalties in *Miller*. But none of these cases—*Graham*, *Miller*, or the death-penalty-eligibility cases—makes clear why the extreme severity of a penalty and certain other "different" factors call for categorical rather than as-applied analysis.

In *Graham*, Justice Kennedy began his opinion by explaining that the Court was taking a categorical approach rather than engaging in as-applied-to-these-facts adjudication because the defendant had specifically raised a categorical

²¹ *Miller*, 132 S. Ct. at 2457–60.

²² *Id.* at 2460–75; *Graham*, 130 S. Ct. at 2017–34.

²³ *Miller*, 132 S. Ct. at 2458–60.

²⁴ Later in Justice Kagan's opinion, she briefly defended the use of that approach by noting that *Graham* had likened LWOP penalties to the death penalty, and had therefore applied the categorical approach previously only used in death penalty cases. *Id.* at 2466.

challenge.²⁵ The same was true in *Miller*—both defendants had framed the issues in categorical terms.²⁶ But Justice Kagan did not mention that fact; she merely cited the Court's prior categorical bans (in death penalty cases and *Graham*), and proceeded to apply that approach.²⁷ There are also problems with the "petitioner-requested-it" rationale in *Graham*. As Chief Justice Roberts noted in his concurrence,²⁸ Mr. Graham had raised an additional, as-applied challenge, and Roberts believed the majority could and should have chosen to rule on those grounds—in effect saying: "we only allow categorical challenges in death penalty cases." Of course, the Court could no longer say that after *Graham*. But should the choice of approach depend on petitioners' framing of the issues, given the ease with which they can re-cast their arguments in categorical terms, and the apparent benefit to them in doing so?

It could also be argued that challenges to mandatory penalties are inherently categorical, since such statutes arguably impose a distinct type of penalty, applicable to a ready-made category of crimes. But the Court could still have opted for a *Solem-Harmelin-Ewing* as-applied analysis (just as the plurality and dissenters did in *Harmelin*). Instead, Justice Kagan leaped immediately to categorical analysis, without even identifying that as a choice or a threshold issue (and without mentioning the defendants' requests for a categorical ruling, the absence of such a request in *Harmelin*, or the *Graham* precedent applying that approach to LWOP sentences).²⁹

In light of the minimal reasoning in *Graham* and *Miller* regarding the choice of categorical analysis, perhaps the majorities in these cases simply preferred to apply that approach. One obvious reason for at least some justices to prefer categorical adjudication is that it seems to grant more constitutional protection than an as-applied approach subject to the limitations added by the *Harmelin* and *Ewing* pluralities.³⁰ Perhaps even Justice Kennedy, the author of the *Harmelin* plurality, now views *Harmelin-Ewing* analysis as too confining for certain kinds of cases and prefers to expand Eighth Amendment protections by shifting to an alternative set of standards. Certainly on the facts of Mr. Miller's case—intentional, first-person robbery-homicide by beating the victim and setting his home on fire³¹—it

²⁵ *Graham*, 130 S. Ct. at 2021–23.

²⁶ See Petition for Writ of Certiorari at 8–10, *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (No. 10-9646); See Petition for Writ of Certiorari at 8–10, *Jackson v. Hobbs*, 132 S. Ct. 548 (2011) (No. 10-9647).

²⁷ *Miller*, 132 S. Ct. at 2463–68.

²⁸ *Graham*, 130 S. Ct. at 2039, n.* (Roberts, C.J., concurring). Justice Roberts rejected a categorical ban because he believed some juvenile nonhomicide offenders merit an LWOP sentence, and that as-applied analysis is an adequate method to identify those who do not. *Id.*

²⁹ *Miller*, 132 S. Ct. at 2463–68. However, later in her opinion Justice Kagan briefly defended the choice of categorical analysis. See *supra* note 24.

³⁰ The limitations added in *Harmelin* and *Ewing* are discussed in text at notes 110–13, *infra*.

³¹ *Miller*, 132 S. Ct. at 2462.

might be difficult (though not impossible—see further discussion in Part II below) to make the “threshold showing” required by *Harmelin* that the LWOP penalty Miller received was grossly disproportionate to his crimes. Moreover, in as-applied analysis, the defects of a mandatory penalty might not even be justiciable—the question in such analysis is whether LWOP is grossly disproportionate to *this defendant’s* culpability and crime(s), not whether such a penalty might be excessive for other defendants subject to the mandatory-LWOP law.

Apart from providing more constitutional protection (a matter of lesser concern for moderate justices, perhaps including Kennedy), are there also practical reasons to view categorical adjudication as the preferred vehicle for Eighth Amendment challenges? At first blush, this might seem counter-intuitive. Aren’t categorical constitutional bans on a particular penalty very likely to: a) sweep more broadly than the core values being protected, b) interfere more frequently (than rarely-successful as-applied challenges) in legislative penalty schemes, and c) constitute the sort of “judicial activism” that conservatives (and now sometimes also liberals) deplore? The answer to each of the above questions is: yes, that will often be true, but no more true than when the Court—whether dominated by liberal or conservative justices—has chosen to create overbroad, “bright-line” rules rather than continue to apply general standards, one case at a time, under a series of “factors” and/or “the totality of the circumstances.” Such bright-line rules have often been recognized in Fourth Amendment cases, usually (but not always) in favor of overbroad police powers.³² Other well-known examples of such rules in the criminal procedure realm include *Miranda* warning and waiver requirements (though not much is left of that overbroad rule other than the *Edwards*³³ line of cases), and the flat requirement of appointed counsel in all felony cases under *Gideon v. Wainwright*.³⁴

Bright-line and other categorical rules are easier for courts to apply, and they protect both trial and appellate courts from a flood of fact-specific challenges. Categorical bans on a penalty also tend to lessen sentencing disparities, especially the gross disparities that arise when a severe penalty is rarely actually imposed. Under a case-specific, as-applied approach, imposition of such a penalty would presumably remain rare in practice, but such highly selective severity would make the penalty as capricious, wanton, and freakish as some death penalties the Court

³² See, e.g., *Atwater v. City of Lago Vista*, 532 U.S. 318, 354–55 (2001) (The police need only probable cause to make a custodial arrest, no matter how minor the crime or how lacking in case-specific need such an arrest may be.); *Arizona v. Hicks*, 480 U.S. 321, 325 (1987) (“[A] search is a search,” no matter how minor the intrusion, and must be justified by probable cause—not just reasonable suspicion.).

³³ See *Minnick v. Mississippi*, 498 U.S. 146, 156 (1990) (*Edwards* protections continue even after the suspect has consulted counsel multiple times.); *Edwards v. Arizona*, 451 U.S. 477, 583–87 (1981) (Higher *Miranda* waiver standards apply whenever the suspect has requested counsel.).

³⁴ 372 U.S. 335, 344–45 (1963).

has invalidated. Given the limits of our adversary and judicial systems, it seems almost certain that case-specific review will fail to detect and prevent some cases of constitutional disproportionality. That is particularly likely to be true in cases involving juveniles, mentally retarded offenders, or others with substantial cognitive and/or emotional limitations. As Justice Kennedy noted in his *Graham* opinion, any case involving a juvenile offender raises greater risks of poor defendant litigation choices and communication with counsel, and limited overall defense effectiveness, thus greatly increasing the odds that the offender will receive an unconstitutionally severe sentence.³⁵ Finally, the Court has long stressed that Eighth Amendment review should, to the greatest extent possible, be informed by "objective factors."³⁶ Categorical rules are arguably more objective than any version of the *Solem-Harmelin-Ewing* standards.³⁷

In short, even though categorical rules might seem less defensible than case-specific adjudication, such rules have important normative and systemic advantages. But that does not mean the Court has or should abandon case-specific, "standards"-based adjudication of the kind contemplated under the *Solem-Harmelin-Ewing* line of cases. Sometimes the nature of the legal issues or the injustice arguably suffered by the complaining party do not permit satisfactory categorical analysis (for example, the relevant factors suggesting constitutional invalidity may be too numerous and/or too complex or inter-related to yield a coherent and workable "rule"). In that situation, case-specific adjudication, applying overall standards and/or multiple relevant factors will be necessary. Indeed, *Miller* effectively recognizes this point in that it requires courts to make a case-specific decision about whether to impose LWOP on a juvenile offender.³⁸ The Court has generally been unsympathetic to such challenges, but the kinds of offense, offender, and other factors recognized in categorical-ban decisions may make it easier in the future for courts to find Eighth Amendment violations under the *Solem-Harmelin-Ewing* standards (see further discussion in Part II, below).

B. After *Miller*, How Exactly Does Categorical Analysis Work?

Assuming a defendant's situation does lend itself to categorical adjudication, and that the Court (or a lower court) is willing to entertain such a challenge, how exactly is categorical analysis to be conducted? Justice Kagan's majority opinion in *Miller* follows a different analytical path than *Graham* and the earlier death

³⁵ *Graham v. Florida*, 130 S. Ct. 2011, 2032 (2010).

³⁶ See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 1000 (1991) (Kennedy, J., concurring).

³⁷ That is especially true after *Harmelin*, which made the *Solem* factors *less* objective by shifting emphasis to the first factor and refusing to define the underlying normative standards that apply at each step of the revised *Solem* analysis. See generally, Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571 (2005).

³⁸ *Miller v. Alabama*, 132 S. Ct. 2455, 2467–68 (2012).

penalty decisions. And in neither *Miller* nor *Graham* did the majority invoke the “gross disproportionality” standard used in as-applied (*Solem-Harmelin-Ewing*) challenges (and also cited in some earlier death penalty decisions).

In *Graham*, Justice Kennedy summarized the Court’s categorical-adjudication approach as follows:

The Court first considers “objective indicia of society’s standards, as expressed in legislative enactments and state practice” to determine whether there is a national consensus against the sentencing practice at issue. [citing *Roper*]. Next, looking to “the standards elaborated by controlling precedents and by the Court’s own understanding and interpretation of the Eighth Amendment’s text, history, meaning, and purpose,” [citing *Kennedy v. Louisiana*] the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution [citing *Roper*].³⁹

But in *Miller*, instead of beginning with the national-consensus assessment, Justice Kagan’s categorical analysis begins with what amounts to the Court’s independent judgment—without mentioning the latter by name. But then, why should the Court talk about its policy assessments that way? The Court is often called upon to make such judgments in order to resolve constitutional issues raised by the parties, within the space left open (to a ruling either way) by precedent, constitutional text, and history.⁴⁰ In any event, the fact that Justice Kagan does not call attention to the Court’s independent judgment, as somehow a distinctive thing for the Court to do, may suggest a degree of comfort with more frequent recognition of Eighth Amendment limitations. Putting the national-consensus discussion second also suggests that less weight will be given to that step in the analysis. In sum: the order and phrasing of Kagan’s opinion may mean that five justices are no longer willing to abdicate their responsibility to play a meaningful checks-and-balances role, and protect politically powerless defendants from excessive (and highly selective) treatment by legislative and executive officials.

Justice Kagan’s independent-judgment analysis, like Justice Kennedy’s in *Graham*, considers whether the challenged penalty can be justified under generally-accepted purposes of punishment (referred to as “penological

³⁹ *Graham*, 130 S. Ct. at 2021–23.

⁴⁰ See Douglas A. Berman, *Questioning Forceful (But Suspect) Claims by the Varied Miller Dissents: Alito/Legislative Judgment Concerns*, SENT’G L. & POL’Y (July 2, 2012), available at http://sentencing.typepad.com/sentencing_law_and_policy/2012/07/questioning-forceful-but-suspect-claims-by-the-varied-miller-dissents-alitolegislative-judgment-conc.html (critiquing Justice Alito’s complaint in *Miller* about the Court’s increasingly “inward-looking” jurisprudence, and pointing out that the Court (and Justice Alito himself) often makes its own constitutional judgments about individual rights protected by the First, Second, Fourth, Fifth, and Sixth Amendments, and does not merely “tally . . . the positions taken by state legislatures”).

justifications").⁴¹ Justice Kennedy's opinion in *Graham* had seemed to emphasize retributive limits on severe penalties, focusing on the different degrees of harm caused by homicide and nonhomicide crimes, and on the juvenile offender's limited personal culpability.⁴² This emphasis suggested that in future cases the Court might be willing to find (as it came close to finding in several death penalty cases⁴³ and at least one non-death penalty case⁴⁴) that retributive disproportionality, by itself, is sufficient to constitute an Eighth Amendment violation. But in *Miller*, Justice Kagan's opinion seems to give equal weight to retribution and various crime control goals, considering each in turn and finding that none of them can justify a mandatory LWOP penalty applied to juveniles.⁴⁵

In light of Kagan's opinion, it seems more clear than ever that a punishment will not violate the Eighth Amendment unless it is found to be unjustified in its severity (and therefore excessive) relative to *every one* of these traditional sentencing purposes. To that extent, *Miller* may be a step backwards, compared with *Graham* and some earlier cases. Like Justice Kennedy's plurality opinion in *Harmelin*, stating that the Eighth Amendment "does not mandate . . . any one penological theory,"⁴⁶ *Miller* seems clearly to reject the argument I and several other scholars⁴⁷ have advanced: that the Eighth Amendment should place a retributive upper limit on the pursuit of crime-control goals. And if the Court was unwilling to recognize such a desert-limit for juveniles, it seems unlikely that the Court will do this any time soon for adults.

The refusal to emphasize retributive proportionality leaves the Court with a problem it has had at least since *Harmelin*—if disproportionality remains the underlying injustice that the Cruel and Unusual Punishment Clause is designed to protect against, and if violations of that Clause require a showing that no traditional punishment goal can justify the severity of the penalty being challenged, then how should disproportionality be defined and measured relative to non-retributive goals such as deterrence, incapacitation, and rehabilitation? Justice

⁴¹ *Miller*, 132 S. Ct. at 2465.

⁴² See *Graham*, 130 S. Ct. at 2026–27.

⁴³ See *Kennedy v. Louisiana*, 554 U.S. 407, 420–21, 441 (2008); *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

⁴⁴ *Solem v. Helm*, 463 U.S. 277, 303 (1983).

⁴⁵ Retribution was rejected because of the diminished culpability of juveniles, which a mandatory penalty prevents the sentencing court from considering at all. Deterrence was rejected because the same characteristics that make juveniles less culpable also make them less deterrable even by severe penalties. Incapacitation could not justify LWOP because that penalty requires a judgment of permanent incorrigibility, a condition "inconsistent with youth." And of course, rehabilitation could not justify LWOP because that penalty "foreswears altogether the rehabilitative ideal." *Miller*, 132 S. Ct. at 2465.

⁴⁶ *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991).

⁴⁷ See, e.g., Frase, *supra* note 37, at 628–34; Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 683 (2005); John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899 (2011).

Scalia has argued that with respect to such goals, the concept of proportionality is meaningless—that proportionality is inherently a retributive concept.⁴⁸

However, as I have argued in previous writings,⁴⁹ there are two well-established non-retributive proportionality principles that have been applied in a wide variety of constitutional contexts, in the U.S. and in foreign and international law. Both principles reflect core precepts of utilitarian philosophy that recognize that meaningful upper limits must be placed on the severity of government measures. The first principle, what I call “ends-benefits” proportionality, requires that the costs and burdens of punishment should not exceed the likely benefits to be achieved, and that the added costs and burdens of a more severe penalty compared to a lesser one should not exceed the likely added benefits.⁵⁰ The second principle, “alternative-means” proportionality (referred to by some writers as the principle of parsimony or necessity, and akin to constitutional requirements of “narrow tailoring”) posits that a penalty should be the least severe measure that will suffice under the circumstances—if a less severe punishment will achieve the same benefits, the more severe penalty is excessive.⁵¹

Both of the principles above may have been implicitly applied in *Graham* and *Miller*. These cases each rejected deterrence as a rationale for the challenged penalty because juvenile offenders are unlikely to be deterred by severe penalties given their immaturity, recklessness, impetuosity, and susceptibility of peer pressure; thus, “any limited deterrent effect provided by life without parole is not enough to justify the sentence.”⁵² This “not-worth-it” assessment is a form of ends-benefits proportionality analysis.

Likewise, *Graham* and *Miller* implicitly applied alternative-means analysis. Both cases rejected incapacitation as a justification for the challenged LWOP penalties because such a sentence may prove, years later, to have been unnecessarily severe: juveniles have a greater capacity for change than adults, yet an LWOP sentence presupposes that all offenders subject to the penalty are incorrigible and will remain so until they die.⁵³ This “less-might-prove-to-be-enough” argument is an application of the alternative-means proportionality principle.

⁴⁸ *Harmelin*, 501 U.S. at 989; *Ewing v. California*, 538 U.S. 11, 31 (Scalia, J., concurring).

⁴⁹ See Richard S. Frase, *Limiting Excessive Prison Sentences under Federal and State Constitutions*, 11 U. PA. J. CONST. L. 39, 43–49 (2008); Frase, *supra* note 37, at 592; E. THOMAS SULLIVAN & RICHARD S. FRASE, *PROPORTIONALITY PRINCIPLES IN AMERICAN LAW: CONTROLLING EXCESSIVE GOVERNMENT ACTIONS* 3–11 (2009).

⁵⁰ Frase, *Limiting Excessive Prison Sentences Under Federal and State Constitutions*, *supra* note 49, at 44–45.

⁵¹ *Id.* at 45–46.

⁵² *Graham v. Florida*, 130 S. Ct. 2011, 2029 (2010). It is not clear, however, whether the Court means that an LWOP sentence will have no deterrent effect on juvenile offenders or whether it means that eliminating the possibility of parole will not provide a sufficient marginal increase in deterrence relative to a sentence of life imprisonment with the possibility of parole.

⁵³ *Id.* at 2028–30; *Miller v. Alabama*, 132 S. Ct. 2455, 2465 (2012).

Despite the apparent rejection in *Miller* of retributive limits on the pursuit of deterrence and incapacitation, Justice Kagan's opinion does, as previously noted, suggest a greater willingness to place Eighth Amendment limits on severe prison sentences.⁵⁴ Another sign of this shift may be the disappearance, in the Court's recent categorical rulings, of the "gross disproportionality" standard put forth in the *Harmelin* plurality and repeated by Justice O'Connor in her *Ewing* plurality. This standard is never mentioned in Kagan's *Miller* opinion (nor in Justice Breyer's concurrence).⁵⁵ And in *Graham*, Justice Kennedy (author of the *Harmelin* plurality), only mentioned the gross disproportionality standard when he was discussing as-applied challenges.⁵⁶ Justice Kagan does, however, frequently mention proportionality as the core Eighth Amendment standard.⁵⁷

The omission of the qualifier "gross" might suggest that the current majority does not view a finding of an Eighth Amendment violation as quite such an exceptional event as it once did. Perhaps unconstitutional disproportionality need not be "gross," at least for the most severe penalties of death and LWOP (alternatively, perhaps disproportionality is inherently "gross" and unacceptable when such severe penalties are imposed). References to gross disproportionality had already begun to disappear in categorical-ban death penalty cases: that standard was only briefly mentioned in the *Roper* and *Kennedy* majority opinions, quoting language from earlier death penalty cases,⁵⁸ and there had been no mention of the standard by the majority in two earlier juvenile death penalty cases, *Thompson v. Oklahoma*⁵⁹ and *Stanford v. Kentucky*.⁶⁰

But there may also be another reason to omit or de-emphasize the "gross" disproportionality standard in a categorical analysis. When the Court bans a particular penalty for a group of crimes or offenders, it is not necessarily making a finding that application of the penalty in such cases would, *in every instance*, impose the kind of grossly excessive punishment that violates the Eighth Amendment under as-applied analysis. Instead, the Court is saying that there is an unacceptable risk that at least some of the offenders in that group will receive such punishment, and that the only way to ensure that they do not is to ban the penalty for the entire category of cases. The ultimate goal may still be to protect offenders from grossly disproportionate severity—especially when the most severe penalties are being applied and one or more other "different" factors indicates a heightened risk of disproportionality. But it is not plausible to suppose that every defendant

⁵⁴ See *supra* notes 39–41 and accompanying text.

⁵⁵ *Miller*, 132 S. Ct. at 2461–82.

⁵⁶ *Graham*, 130 S. Ct. at 2021.

⁵⁷ *Miller*, 132 S. Ct. at 2461–75.

⁵⁸ *Roper v. Simmons*, 543 U.S. 551, 589 (2005) (O'Connor, J., dissenting) (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977)); *Kennedy v. Louisiana*, 554 U.S. 407, 429, 441 (2008) (quoting *Coker*, 433 U.S. at 592 and *Gregg v. Georgia*, 428 U.S. 153, 187 (1976)).

⁵⁹ 487 U.S. 815 (1988).

⁶⁰ 492 U.S. 361 (1989).

benefitting from the categorical ban would otherwise suffer that degree of injustice.

This necessary-overbreadth rationale was reflected in the *Graham* Court's choice to categorically ban LWOP sentences for all nonhomicide offenders less than eighteen years old at the time of their offense, rather than letting courts make individualized assessments of the culpability and malleability of each juvenile offender. Citing *Roper*, in which a similar case-by-case assessment was rejected, Justice Kennedy's *Graham* opinion concluded that only a broad rule covering all juvenile offenders could avoid a number of serious risks: 1) that the aggravating circumstances of the conviction offense may overpower mitigating arguments based on the offender's youth; 2) that such erroneous findings might also result from the known difficulties some juveniles have in working effectively with their lawyers; and 3) that even if correct assessments of these matters were made at the time of sentencing, the LWOP sentence will cause some juvenile offenders to be unfairly and unnecessarily condemned to die in prison (substantial changes, due to maturation, treatment and/or other interventions, or personal effort, might clearly show that the terrible crimes they committed as teenagers were not representative of their true characters).⁶¹ In *Miller*, similar reasoning underlay the Court's rejection of mandatory LWOP penalties: "By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment."⁶²

This line of reasoning is nothing new, of course. A number of constitutional criminal procedure doctrines are deliberately over-protective, based on the Court's view that there would otherwise be an unacceptable risk of constitutional violations. Thus, as the Court has recently emphasized, *Miranda* is constitutionally required not because every confession obtained in custodial interrogation without warning and waiver safeguards is coerced, but because without compliance with those safeguards there is an unacceptable risk that some offenders will be convicted based on coerced statements.⁶³ In *Bruton v. United States*⁶⁴ and subsequent cases, the Court found a denial of the right of confrontation when a non-testifying co-defendant's confession, directly implicating the defendant-appellant, was admitted in their joint trial. The Court found that limiting instructions telling the jury to disregard the confession as to defendant-appellant were insufficient due to the unacceptable risk that jurors would ignore those instructions.⁶⁵ Similarly, search warrants (where applicable) are required not because every violation of this requirement means that the search

⁶¹ *Graham*, 130 S. Ct. at 2032–33.

⁶² *Miller*, 132 S. Ct. at 2469.

⁶³ *United States v. Patane*, 542 U.S. 630, 639 (2004); *Dickerson v. United States*, 530 U.S. 428, 442 (2000).

⁶⁴ 391 U.S. 123 (1968).

⁶⁵ *Id.* at 136–37.

lacked probable cause or otherwise violated Fourth Amendment requirements, but because in the absence of a warrant there is an unacceptable risk that such violations will occur and not be prevented or detected after the fact.⁶⁶

C. Categorical Challenges, Past and Future: What's "Different" Enough?

Even if categorical challenges are now preferred by the Court, or at least will be more readily tolerated, and even if a challenged penalty and the offender's conviction offense and/or personal characteristics seem to suggest a workable categorical rule, how can the Court (and lower courts) know when to use this approach to recognize a new Eighth Amendment limitation? In this section I review the Court's prior cases approving categorical challenges, and use these cases to identify some general patterns that may suggest useful guiding principles for future categorical challenges (those challenges are discussed more fully in sections D and E below). Essentially, the question I am asking is: how many "different" factors does it take to justify a new categorical ban? The discussion below assumes that, for the foreseeable future, the death penalty will continue to be viewed as constitutionally different, even from LWOP, so I separately analyze the Court's cases invalidating each of these extremely-severe penalties. In the third subsection below, I consider what guidance can be gleaned from two older cases, involving neither the death penalty nor LWOP, in which the Court found an Eighth Amendment violation.

One obvious limitation of any schema based on the number and type of "differents" is that such factors, whether viewed individually or in groups, can only serve as a guide to how the Court makes its "independent judgments" about the constitutionality of a penalty in particular circumstances. What about the "national consensus" element in categorical analysis? As indicated above, Justice Kagan's opinion in *Miller* puts this element second⁶⁷ (it had come first as recently as *Graham*),⁶⁸ which may indicate an intent to de-emphasize this step in the analysis. Indeed, Justice Alito's dissent argues that this element has been downgraded so much that the Court's decisions are "now entirely inward looking."⁶⁹ But it seems likely that the Court will continue to examine existing laws and practices, to make sure its categorical bans are not invalidating penalties that enjoy substantial public, legislative, and practitioner support.

⁶⁶ See, e.g., *Katz v. United States*, 389 U.S. 347, 354–59 (1967) and *Johnson v. United States*, 333 U.S. 10, 13–14 (1948). In both cases, the Court refused to retroactively validate a warrantless search despite the government's claim that prior to the search the police had ample grounds to obtain a court order fully authorizing the search they conducted.

⁶⁷ *Miller*, 132 S. Ct. at 2459.

⁶⁸ *Graham*, 130 S. Ct. at 2023.

⁶⁹ *Miller*, 132 S. Ct. at 2490 (Alito, J., dissenting).

1. Death Penalties

Although the Court has not expressed the holdings in this way, its cases recognizing categorical bans on capital punishment can be viewed as all requiring two “differents”: the death penalty itself, and one other factor. Those other factors, in the order in which they were first recognized, are:

- Mandatory penalty⁷⁰
- Nonhomicide conviction offense⁷¹
- Low-culpability felony-murder accomplice⁷²
- Juvenile offender⁷³
- Mentally retarded offender⁷⁴

Although Justice Kagan’s opinion in *Miller* viewed the first of these factors and the next four as falling into two distinct “strands” of precedent,⁷⁵ they could also be classified in other ways. The first factor relates to sentencing procedure; the next two relate to the offense or the defendant’s role in it; and the last two are based on offender characteristics. What these five factors have in common is the Court’s conclusion that, for at least some offenders falling in each category, imposition of the death penalty is likely to be unconstitutionally excessive, so that penalty must be banned in all such cases (the undue-risk, necessary-overbreadth rationale discussed earlier).

2. LWOP Sentences

In *Graham* and *Miller*, part of the rationale for expanding the categorical approach to LWOP appeared to be that this penalty is, in some ways, as severe as capital punishment—“the sentence alters the offender’s life by a forfeiture that is irrevocable,” denying all hope of restoration.⁷⁶ Nevertheless, an analysis of the Court’s cases invalidating LWOP penalties suggests that it takes a stronger showing to invalidate LWOP than the death penalty. In effect (although not in any formal language of the opinions), LWOP penalties will only be struck down if there are three “different” factors: the LWOP penalty itself, and two other

⁷⁰ *Lockett v. Ohio*, 438 U.S. 586 (1978); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

⁷¹ *Kennedy v. Louisiana*, 554 U.S. 407 (2008); *Coker v. Georgia*, 433 U.S. 584 (1977).

⁷² *Enmund v. Florida*, 458 U.S. 782, 782 (1982).

⁷³ *Roper v. Simmons*, 543 U.S. 551, 551 (2005); *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

⁷⁴ *Atkins v. Virginia*, 536 U.S. 304 (2002).

⁷⁵ *Miller v. Alabama*, 132 S. Ct. 2455, 2463 (2012).

⁷⁶ *Graham v. Florida*, 130 S. Ct. 2011, 2027 (2010); *Miller*, 132 S. Ct. at 2466.

factors.⁷⁷ Those other factors, in the order and combinations in which they were recognized, are:

- Juvenile offender + nonhomicide conviction offense⁷⁸
- Juvenile offender + mandatory penalty⁷⁹

All of these other (non-LWOP) factors had previously been recognized in death penalty cases. But as noted above, in death cases the presence of *one* of these "differents" was deemed sufficient to render the death penalty unconstitutional. The facts of *Graham* and *Miller* could be read to imply that the death penalty is still different, and that even a prison sentence as severe as LWOP requires two other "differents," not just one.

Two other LWOP cases have come before the Court, and in one of them, *Solem v. Helm*, the Court found the penalty unconstitutional.⁸⁰ Although *Solem* should presumably be deemed an as-applied decision (under a version of that approach more favorable to defendants than the versions later applied in *Harmelin* and *Ewing*),⁸¹ it might be possible to view *Solem* as a categorical ruling. Indeed, this view of *Solem* might be required in order to uphold the result in that case notwithstanding subsequent tightening of as-applied standards. In order to view *Solem* as a categorical ban on LWOP, comparable to the later bans in *Graham* and *Miller*, the analysis above suggests that it would be necessary to identify at least two other "different" factors in *Solem*. Possible candidates include:

- Minor, non-violent conviction offense
- Non-violent prior record
- Intra-jurisdictional disproportionality (*Solem* prong 2)
- Inter-jurisdictional disproportionality (*Solem* prong 3)

None of these possible "different" factors has been recognized as such in either death penalty or more recent, categorical-ban LWOP cases, but that observation could suggest several, very different conclusions: a) *Solem* is no longer good law on its facts; or b) *Solem* is still good law but such a case is not well-suited to categorical rules, so the result must be analyzed and justified under as-applied analysis (which might not change the result, see further discussion of the future of as-applied analysis, Part II *infra*); or c) the list of relevant "different" factors is broader than those thus far recognized in cases explicitly decided under

⁷⁷ Cf. Michael M. O'Hear, *The Beginning of the End for Life Without Parole?*, 23 FED. SENT'G REP. 1, 2 (2010).

⁷⁸ *Graham*, 130 S. Ct. at 2014–17.

⁷⁹ *Miller*, 132 S. Ct. at 2457–60.

⁸⁰ The other LWOP case was *Harmelin v. Michigan*, 501 U.S. 957 (1991).

⁸¹ *Solem v. Helm*, 463 U.S. 277 (1983). The *Harmelin* and *Ewing* modifications to the *Solem* standards are discussed in text at notes 110–13, *infra*.

the categorical approach (more on this possibility below).

3. Older Eighth Amendment violation cases (neither death penalty nor LWOP)

In two earlier cases, the Court found a penalty to be cruel and unusual punishment.⁸² After *Graham*, one commentator concluded that both of these earlier cases had imposed categorical bans on the penalties at issue.⁸³ But it is not clear whether that is the best reading of these cases, especially the first one.

In *Weems v. United States*,⁸⁴ the Court struck down a Philippine penalty, “cadena temporal,” because of its severity (fifteen years at “hard and painful” labor, in chains), its unusual accessories relative to common law traditions (life-long supervision and loss of civil rights), and the minor nature of the conviction offense (falsifying two government accounts entries, with no required showing of any resulting harm or intent to defraud or otherwise cause harm). This decision could perhaps be seen as an early version of *Solem v. Helm* analysis: the Court compared the cadena penalty’s severity to the minor nature of the offense, and arguably also performed versions of *Solem* intra- and inter-jurisdictional analysis (noting equal or less serious penalties for homicide and other serious crimes, and the absence of penalties similar to cadena in the United States).⁸⁵ It is difficult, however, to (retrospectively) view this holding as a categorical ban. At least in practice, *Weems* did not ban cadena temporal under all circumstances. Philippine officials appear to have interpreted the ruling as limited to minor crimes and continued to use cadena sentences for violent offenses.⁸⁶ Prohibiting a penalty only in cases of minor crimes does not provide a very workable categorical rule, and the only other arguably “different” factor in that case was the unusualness of the penalty.⁸⁷ Assuming *Weems* is still good law on its facts, that case should

⁸² The decision in *Robinson v. California*, 370 U.S. 660 (1962), was also grounded in the Eighth Amendment, but the challenge was not to the sentence but rather to the imposition of any punishment for the status of being a drug addict. Although the Court said that “Even one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold,” *id.* at 667, this case is really more about the (minimal) constitutional limits on criminal liability and has little in common with Eighth Amendment proportionality case law.

⁸³ Eva S. Nilsen, *From Harmelin to Graham—Justice Kennedy Stakes Out a Path to Proportional Punishment*, 23 FED. SENT’G REP. 67, 68 (2010).

⁸⁴ 217 U.S. 349 (1910).

⁸⁵ *Id.* at 363–67, 380–81.

⁸⁶ See Stinneford, *supra* note 47, at 910 n.38 (citing Margaret Raymond, “No Fellow In American Legislation”: *Weems v. United States and the Doctrine of Proportionality*, 30 VT. L. REV. 251, 293–95 (2006)).

⁸⁷ On one view of the Eighth Amendment, the term “unusual” plays a critical role, embodying the founders’ intent to prohibit severe penalties that are “contrary to long usage.” See John F. Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1765 (2008).

probably be deemed an as-applied proportionality ruling.

In *Trop v. Dulles*,⁸⁸ the Court held that expatriation (stripping a native-born American of his citizenship) imposed for wartime desertion and dishonorable discharge violated the Eighth Amendment. Four justices appeared to view the penalty of expatriation as unconstitutional *per se*—a kind of categorical ruling, but one difficult to harmonize with the Court's subsequent categorical-ban cases; the only arguable "that's different" factor cited was the fact that "civilized nations . . . are in virtual unanimity that statelessness is not to be imposed as punishment for crime."⁸⁹ Nor does the plurality's approach resemble subsequent as-applied proportionality analysis—the minor nature of some desertion crimes is only briefly mentioned, and no emphasis is given to the facts of defendant's crime.⁹⁰ If the plurality opinion is deemed to be the holding of the case, perhaps the best way to reconcile *Trop* with contemporary categorical bans under the Eighth Amendment is to view expatriation as a method of punishment (akin to execution by burning or quartering) that is so cruel and inhumane that it is banned under all circumstances.

Justice Brennan's concurring opinion in *Trop* provided the necessary fifth vote supporting the decision, and since his holding would seem to sweep less broadly, it should perhaps be deemed the controlling rationale.⁹¹ Brennan began by noting that the "harshness of the punishment may be an important consideration where the asserted power to expatriate has only a slight or tenuous relation to the granted [war] power."⁹² He then proceeded to, in effect, apply the "independent judgment" part of categorical analysis, examining whether expatriation could be justified under any of the traditional purposes of punishment.⁹³ He concluded that it could not: expatriation is "the very antithesis of rehabilitation" (since it treats the offender as a complete outcast, thus probably encouraging anti-social tendencies); it has a weak effect as an added deterrent (on top of the direct penalties for desertion, up to and including the death penalty); and it has no incapacitative effect unless the deserter is also banished from the country.⁹⁴ As for retribution, Brennan noted that some desertions are technical or very minor, and that was certainly true in this case, although Brennan did not emphasize this point.⁹⁵

⁸⁸ 356 U.S. 86 (1958).

⁸⁹ *Id.* at 102. The plurality also suggested that, if the word "unusual" in the Eighth Amendment had any separate significance, it should mean "something different from that which is generally done," which the plurality felt was true of the denaturalization penalty at issue since it was not explicitly used as a penalty until 1940. *Id.* at 100 n.32. *Cf.* Stinneford, *supra* note 87.

⁹⁰ *Trop*, 356 U.S. at 87–88, 90–91.

⁹¹ See *Marks v. United States*, 430 U.S. 188 (1977).

⁹² *Trop*, 356 U.S. at 110 (Brennan, J., concurring).

⁹³ *Id.* at 111.

⁹⁴ *Id.* at 87 (plurality opinion)

⁹⁵ The defendant had escaped from military confinement on a base in Casablanca, but was on his way back to the base when an army truck came along and he boarded it with no words spoken. *Id.*

In sum: the plurality opinion in *Trop* suggests a categorical ban, but not one closely tied to proportionality or justified by any of the “differents” recognized in later categorical-ban cases. Justice Brennan’s deciding vote provides a more substantive, punishment-goals rationale, foreshadowing part of the Court’s subsequent categorical-rule analysis but lacking any “different” factor other than the rarity with which expatriation has been used as a punishment.

D. Expansions to Adult Sentencing: Are There Now Possibly Five Votes to Overrule Harmelin?

The defects of severe mandatory penalties, recognized in *Miller*, raise the question of whether some mandatory, non-capital penalties might also be found unconstitutional when applied to adults. Such a claim was, of course, rejected by five justices in *Harmelin v. Michigan*.⁹⁶ And of course, juveniles are different. But Eighth Amendment jurisprudence has evolved since *Harmelin* was decided. The discussion below will consider arguments in favor of overruling *Harmelin* on its facts (section E will consider whether *Harmelin* might at least be limited, so that an adult case presenting additional “differents” could result in a successful categorical challenge).

On its face, *Miller* provides little reason to think that *Harmelin*’s acceptance of mandatory adult LWOP penalties will be overruled any time soon—Justice Kagan explicitly distinguished *Harmelin* on its facts, and emphasized the children-are-different argument.⁹⁷ But as Kagan also noted, *Harmelin* was partly based on a death-is-different rationale.⁹⁸ That rationale now carries less weight in light of the Court’s application of death penalty principles to non-capital sentencing in *Graham* and *Miller*. If the Court wished, it could further limit *Harmelin* by pointing out that the defendant in that case had essentially raised a *Solem*-type, as-applied challenge, making at most a death penalty “analogy” argument.⁹⁹ It was not until *Graham* that the Court was required to squarely address a categorical challenge to a prison sentence.

But would the Court wish to overrule *Harmelin* on its facts and recognize a categorical ban on mandatory LWOP in such cases? And how could it do so without opening up a potentially broad range of adult penalties to categorical challenge? Applying the different-enough schema presented in section C above, the first question is: were there at least three important “different” factors in

The plurality and Justice Brennan also made slippery-slope arguments, questioning whether Congress could impose expatriation on anyone who violated any serious duty of citizenship, e.g., for tax evasion, violation of election laws, bank robbery, or drug crimes. *Id.* at 90–93 (plurality opinion); *id.* at 113 (Brennan, J., concurring).

⁹⁶ 501 U.S. 957 (1991).

⁹⁷ *Miller v. Alabama*, 132 S. Ct. 2455, 2470 (2012).

⁹⁸ *Id.*

⁹⁹ Brief of Petitioner, at 21 *Harmelin v. Michigan*, 501 U.S. 957 (1991) (No. 89-7272).

Harmelin's case? The answer is yes. Indeed, there may have been four:

- LWOP
- Mandatory penalty
- Nonhomicide conviction offense
- First offender

The first three of these "different" factors have already been recognized in death penalty and juvenile LWOP cases, and the fourth factor is arguably implicit in the Court's habitual offender cases. If adult repeat offenders can be subjected to severe prison penalties,¹⁰⁰ the opposite offending pattern—complete lack of prior convictions—surely ought to count as an important factor arguing against such a penalty.

As for what remains of the national consensus prong of categorical analysis, the case for overruling *Harmelin* is even stronger. As was pointed out in Justice White's dissenting opinion in *Harmelin*, no other state would have punished such an offender even "nearly" as severely.¹⁰¹

But of course, adults are different from juveniles. Why should the Court take even a small step toward expanding categorical analysis to adult sentencing? Why should even a severe mandatory penalty like the one at issue in *Harmelin* permit such an expansion? The answer to the latter question is that the vices of mandatory LWOP penalties are not limited to juveniles. Such laws virtually guarantee that some offenders subject to the law will receive punishment that is excessive and unjustified under all traditional purposes of punishment—exceeding upper retributive limits, failing to provide much if any incapacitative or additional deterrent benefit, and (by definition, for an LWOP sentence) "foreswear[ing] altogether the rehabilitative ideal."¹⁰² Of course, adult offenders as a group do not present the unique characteristics that make juveniles, as a group, less culpable, less deterrable, more likely to cease being dangerous enough to require incapacitation at some point before they die in prison, and less competent to assist in their defense. But mitigating culpability factors, limited deterrability, uncertain long-term dangerousness, and reduced defense competency are not infrequently found in adult cases. The mandatory LWOP penalty prevents the sentencing court as well as later judicial or correctional releasing authorities from considering any such facts.

¹⁰⁰ See *Ewing v. California*, 538 U.S. 11 (2003); *Hutto v. Davis*, 454 U.S. 370 (1982) (per curiam); *Rummel v. Estelle*, 445 U.S. 263 (1980).

¹⁰¹ *Harmelin*, 501 U.S. at 1026 (White, J., dissenting). The dissent also foreshadowed the later expansion of death penalty principles to LWOP cases by stating that the lack of counterparts to Mr. Harmelin's sentence, in other jurisdictions, "is enough to establish the degree of national consensus this Court has previously thought sufficient to label a particular punishment cruel and unusual." *Id.* at 1027 (internal quotations omitted).

¹⁰² *Miller*, 132 S. Ct. at 2465 (quoting *Graham v. Florida*, 130 S. Ct. 2017, 2030 (2011)).

As noted previously, the categorical rules adopted in the Court's recent cases appear to reflect a deliberate preference for bright-line, overbroad rules in place of case-specific assessments. Such rules are easier for trial and appellate courts to apply, reduce sentencing disparity, and avoid the risk that as-applied challenges will fail to detect and prevent all constitutionally-excessive penalties. Almost all of these rationales apply to adults as well as juveniles. Even if a lower percentage of adult cases pose serious risks of excessive punishment, the much higher volume of adult cases increases the burden on courts of using as-applied standards and increases the potential number of unconstitutionally severe sentences.

Although not expressly mentioned in *Miller*, another vice of mandatory penalties is the power they give to prosecutors, not only to dictate (or avoid) severe "sentences," but also to coerce guilty pleas. In fact, these problems were illustrated by the facts of these two cases. In both *Miller* and *Jackson* the defendants were tried as adults only because the District Attorney exercised the discretion to file adult-court charges or request removal to that court.¹⁰³ *Miller*'s co-defendant avoided LWOP by being allowed to plead guilty to a lesser charge in return for testifying against *Miller*.¹⁰⁴

Despite all the arguments above, the Court may decline to overrule *Harmelin* on its facts. The Court is always reluctant to openly admit error, and juveniles truly are different as a group; they also constitute a readily-defined class of offenders. In effect, the Court may decide that juveniles are *really different*, like the death penalty, so that at a minimum it will take more than two other "differents" to justify categorical bans on adult LWOP penalties. This possibility will be examined in the next section.

E. Are There Five Votes to at Least Further Limit *Harmelin*?

Even if *Harmelin* will not be overruled on its facts, will the Court apply categorical analysis and invalidate a mandatory LWOP sentence in cases presenting additional previously- or newly-recognized "different" factors? Clearly, *Harmelin*'s reach has already been limited: *Graham* held that at least some LWOPs imposed for a nonhomicide crime are unconstitutional;¹⁰⁵ *Miller* held that, even for homicide crimes, at least some mandatory LWOP penalties are unconstitutional.¹⁰⁶ In both of those cases, *Harmelin* was limited because juveniles are different.

But some adult cases are arguably just as categorically "different" as juvenile cases, at least when certain other factors, not present in *Harmelin*, are present. Perhaps the addition of one or more other "different" factors would tip the

¹⁰³ *Id.* at 2461–62; *Jackson v. Hobbs*, 132 S. Ct. 548 (2011).

¹⁰⁴ *Miller*, 132 S. Ct. at 2463.

¹⁰⁵ *Graham v. Florida*, 130 S. Ct. 2011, 2011 (2010).

¹⁰⁶ *Miller*, 132 S. Ct. at 2457–60 (2012).

constitutional scale, permit categorical analysis, and lead to a finding of unconstitutionality. The most compelling case for this result would be one including the four actual *Harmelin* "differents," plus two others that have already been recognized in death penalty¹⁰⁷ cases (the last two listed below):

- LWOP
- Mandatory penalty
- Nonhomicide conviction offense
- First offender
- Mentally retarded offender
- Low-culpability accomplice

Indeed, perhaps only one of the last two factors would be required. Both involve low offender culpability, and in *Atkins* and *Enmund* the Court found each factor, alone, sufficient to ban the death penalty even in a homicide case.¹⁰⁸ If the hypothetical "new *Harmelin*" defendant were mentally retarded, or if Mr. Harmelin's wife or girlfriend were held liable as an accomplice but with only a minor role in the crime, the arguments for applying a categorical prohibition against mandatory LWOP would be very strong. And the arguments might still be strong even if the hypothetical accomplice or mentally retarded defendant was not a first offender. In *Atkins* and *Enmund*, the offenders' prior records did not seem to enter into the Court's decisions.¹⁰⁹

But again, the Court may conclude that juveniles are so "different" that categorical bans of the kind recognized in *Graham* and *Miller* should not be extended to adult prison sentences no matter how many other "different" factors are present. In that event (or in any case not covered by or suitable for whatever new categorical challenges the Court permits in adult prison-sentence cases), as-applied analysis, using the *Solem-Harmelin-Ewing* standards, will remain the only way to raise an Eighth Amendment challenge to the sentence. But as discussed in Part II below, a strong argument can be made that the *Solem-Harmelin-Ewing* standards are now easier to meet when one or more "different" factors is present.

II. USING "DIFFERENT" FACTORS TO SUPPORT AS-APPLIED (*SOLEM-HARME LIN-EWING*) CHALLENGES

In the discussion above, I examined various ways in which the categorical

¹⁰⁷ Justices Breyer and Sotomayor, concurring in *Miller*, showed that they were willing to apply the low-culpability-accomplice factor in an LWOP case, pointing to the facts of *Jackson*. *Id.* (Breyer & Sotomayor, JJ., concurring).

¹⁰⁸ *Atkins v. Virginia*, 536 U.S. 304 (2002); *Enmund v. Florida*, 458 U.S. 782 (1982).

¹⁰⁹ Mr. Atkins had sixteen prior felony convictions, including for robbery and assault. *Atkins*, 536 U.S. at 339 (Scalia, J., dissenting). Mr. Enmund had previously been convicted of at least one "felony involving the use or threat of violence." *Enmund*, 458 U.S. at 785.

approach might be applied to some severe adult prison sentences, especially mandatory LWOP penalties. But given the Court's strong emphasis in *Graham* and *Miller* on the particular characteristics of juvenile offenders and the similarities between death sentences and LWOP, it may turn out that categorical analysis will be limited to death-penalty and juvenile-LWOP cases. Accordingly, this part of the essay assumes that many if not all adult prison sentences will continue to be governed by as-applied (*Solem-Harmelin-Ewing*) analysis. Nevertheless, the Court's treatment of LWOP, mandatory penalties, and other "different" factors applied in its recent categorical-challenge cases may suggest new grounds for Eighth Amendment relief in as-applied challenges. If the presence of such "different" factors indicates a heightened risk of disproportionate punishment, sometimes justifying more protective categorical analysis, such factors would also seem to indicate a heightened risk that *this defendant's sentence* is disproportionate, adding support to the defendant's as-applied challenge notwithstanding the limits imposed in *Harmelin* and *Ewing*.

Those limits were substantial, arguably putting an end to almost all as-applied challenges.¹¹⁰ In *Harmelin*, Justice Kennedy's plurality opinion modified the three-factor *Solem* standards by specifying that courts should only apply the second and third factors (intra- and inter-jurisdictional comparisons) "in the rare case in which [under *Solem* factor one] a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality."¹¹¹ But if mandatory LWOP for a first-offender charged with simple possession of drugs (albeit a very large quantity) does not raise such an inference, what would?

In *Ewing*, Justice O'Connor's plurality opinion not only approved of Kennedy's "threshold" requirement, but added a further pre-requisite to any consideration of the second and third *Solem* factors that had at most been implicit in *Solem*:¹¹² when applying the first factor, the gravity of the defendant's "offense" is not limited to the crime(s) being sentenced—it also includes, and is increased in proportion to, his prior record of convictions.¹¹³

The remainder of this part considers how the Court's recent categorical-challenge cases might help defendants meet the strict *Solem-Harmelin-Ewing* standards. Section A argues that *Graham*, *Miller*, and other categorical cases may make it easier to get past the *Harmelin-Ewing* threshold test, in cases raising the "different" factors recognized in those cases. Section B considers how the second and third *Solem* factors might be applied, in light of the Court's cited factors and/or

¹¹⁰ Steiker & Steiker, *supra* note 15.

¹¹¹ *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991).

¹¹² In *Solem*, Justice Powell noted that Mr. Helm was charged not just with passing a bad check "but also with being an habitual offender," and Powell further conceded, "a State is justified in punishing a recidivist more severely." *Solem v. Helm*, 463 U.S. 277, 296 (1983). But Powell also stated that the Court "must focus on the . . . felony that triggers the life sentence . . . since Helm already has paid the penalty for each of his prior offenses." *Id.* at 296 n.21.

¹¹³ *Ewing v. California*, 538 U.S. 11, 29–30 (2003).

overall approach in recent categorical decisions.

A. Meeting the Harmelin/Ewing "Threshold" Test

Even if categorical analysis will not be used to overrule or limit *Harmelin* (sections D and E above), the presence of one or more "different" factors recognized in categorical-challenge cases may make it easier for defendants to get past the threshold test and move on to *Solem* factors two and three.

1. LWOP Sentences

Life without the possibility of parole—death in prison—has now been officially recognized in multiple cases (*Solem*, *Graham*, *Miller*) as an extremely severe penalty.¹¹⁴ Although the Court stated that LWOP is particularly severe for a juvenile,¹¹⁵ it also noted factors that arguably also make LWOP very severe for most adult offenders, especially younger ones: the sentence "alters the remainder of his life by a forfeiture that is irrevocable," denying all hope of restoration; and the younger an offender is, the more years in prison they face and the greater the proportion of their life that is forfeited.¹¹⁶ Just as mandatory penalties prevent the sentencing court from considering constitutionally relevant mitigating factors, LWOP prevents parole boards and correctional authorities from considering positive changes in the offender's risk level and/or character, no matter how extensive those changes might be, over periods that will often be measured in decades. Such considerations may serve to tip the scale in the threshold analysis, permitting sentencing courts to consider intra- and inter-jurisdictional comparisons in at least some adult LWOP cases. Indeed, Justice Kagan's dictum that constitutionally permissible juvenile LWOP sentences will be "uncommon,"¹¹⁷ clearly indicates a willingness to find an Eighth Amendment violation in at least some future as-applied challenges.

But of course—juveniles are different. Prosecutors will argue that the Court's comments about LWOP in *Graham* and *Miller* have no application when evaluating adult prison sentences. However, each of the constitutionally relevant mitigating characteristics of juveniles, cited in these cases, is also present for some adults. Even if these characteristics are not sufficiently frequent enough among adult offenders to justify a categorical ban on LWOP sentences, they certainly seem relevant to as-applied analysis and the *Harmelin*/*Ewing* threshold test:

¹¹⁴ *Miller v. Alabama*, 132 S. Ct. 2455 (2012); *Graham v. Florida*, 130 S. Ct. 2011 (2010); *Solem*, 463 U.S. at 277.

¹¹⁵ *Graham*, 130 S. Ct. at 2028.

¹¹⁶ *Miller*, 132 S. Ct. at 2466; *Graham*, 130 S. Ct. at 2027 (internal quotations omitted).

¹¹⁷ *Miller*, 132 S. Ct. at 2469.

- Lack of maturity, recklessness, and impetuosity, resulting in heedless risk-taking—many adult crimes involve spur-of-the-moment decisions by immature offenders;
- Greater vulnerability to negative influences and pressures from family and/or peers—many adult offenders are similarly vulnerable, in particular: low-level gang members, abused wives and girlfriends, and mentally-retarded offenders (a “different” factor that has already been specifically recognized in adult sentencing, despite the absence of capacity to change—see further discussions below);
- Greater capacity to change for the better, becoming less dangerous and less anti-social (character not as well formed; less reason to posit “irretrievable depravity”)—addicts and other adult offenders with treatable crime-causing conditions also have a substantial capacity to change and become law-abiding citizens.

2. Mandatory LWOP

Even where the arguments above are deemed insufficient to pass the *Harmelin/Ewing* threshold test when applied to a discretionary LWOP penalty, those arguments might tip the scale in some cases of mandatory LWOP, since that combination has now effectively been recognized as an even more severe penalty than discretionary LWOP.

3. LWOP plus other “differents”

In addition to the mandatory+LWOP combination, it may be that LWOP plus one or more other recognized “different” factor will be sufficient to pass the threshold test. In particular, courts arguably should be allowed to move on to intra- and inter-jurisdictional comparisons when an LWOP penalty (especially if mandatory) is imposed for a nonhomicide crime committed by an offender who suffers from mental retardation (the *Atkins* factor), or who was held liable on an accomplice theory involving minimal personal culpability (*Enmund*).¹¹⁸ Indeed, it can be argued that the retardation and minor-accomplice factors should apply even to offenders with substantial prior conviction records, since the latter factor was not mentioned by the Court when it recognized those factors.¹¹⁹ Of course, those were death penalty cases, but it seems that death is not as different as it once was.

What about other potential “different” factors, combined with LWOP? In my earlier discussion of whether it might be possible to view *Solem v. Helm* as a categorical ruling, I pointed to several factors in that case (in addition to LWOP),

¹¹⁸ For example, suppose Mr. Harmelin’s girlfriend had also been charged because she loaned him some of the money he used to buy the drugs.

¹¹⁹ See *supra* text accompanying notes 108-09 for a discussion of *Atkins* and *Enmund*.

two of which might help meet the *Harmelin/Ewing* threshold test:

- Minor, non-violent conviction offense
- Non-violent prior record

The first of these factors is actually just a stronger version of the nonhomicide-offense factor recognized in death penalty (*Coker, Kennedy*) and LWOP cases (*Graham*). The second factor above bears no direct relationship to any recognized "different" factor. Indeed, in *Harmelin* even the complete absence of prior convictions seemed to be given little weight in the Court's threshold analysis. But surely that view is wrong. If, as the *Ewing* plurality opinion tells us, an extensive prior record enhances the gravity of the defendant's "offense" in "threshold" analysis,¹²⁰ this factor must cut in both directions—mitigating the gravity of "the offense" when the defendant has no prior record or only a minor record.

4. Severe non-LWOP prison terms

If enough "different" factors are present, should a lengthy non-LWOP prison term sometimes also raise a threshold inference of gross disproportionality? The strongest case would seem to be a prison sentence with a minimum time to serve that is so clearly beyond the defendant's life expectancy that it constitutes LWOP for all practical purposes.¹²¹ Of course, if the Court prefers simplistic, bright-line rules (as its recent endorsement of categorical limits seems to suggest it does, see section I.A above), then the Court may be willing to pretend that such *de facto* LWOP sentences do not exist, or are constitutionally "different" from actual, *de jure* LWOP.

Even then, perhaps the addition of other "different" factors would tip the scale and allow *de facto* LWOP sentences (and even very severe, almost-de-facto-LWOP sentences) to meet the *Harmelin/Ewing* threshold test—provided enough "different" factors are present. For example, suppose a defendant like Jerry Helm, in *Solem* (conviction offense: issuing a \$100 no-account check; prior convictions: all for non-violent property crimes), had been given a 50-year, mandatory-minimum prison term, and that Mr. Helm also suffered from mental retardation.

B. Applying the Second and Third Solem Factors

¹²⁰ *Ewing v. California*, 538 U.S. 11, 28 (2003).

¹²¹ See Frase, *supra* note 37, at 588 (noting the sentence in *Ewing* was equivalent to LWOP); see generally William W. Berry, III, *The Mandatory Meaning of Miller*, AM. CRIM. L. REV., available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2112820 (arguing that *Miller* should be extended to bar mandatory sentences in all "death-in-custody cases," including term-of-years prison terms "approaching the life expectancy of the offender").

Assuming that a court finds the threshold *Harmelin/Ewing* test to have been met, how might the Court's categorical decisions affect application of *Solem's* intra- and inter-jurisdictional comparison factors? Those two factors would have lent substantial support to finding Eighth Amendment violations in both *Harmelin* and *Ewing*.¹²² The Court's recent categorical decisions may not only make it easier to reach the second and third *Solem* factors, but also easier for defendants to find support in them for a finding of (gross) disproportionality.

1. Intra-jurisdictional comparisons (*Solem-2*)

If the Court is moving toward a unitary set of Eighth Amendment standards (see further discussion in subsection 2 below), the absence of any counterpart of the second *Solem* factor in the two-step categorical analysis may indicate that this factor will eventually be discarded. But if it is retained for as-applied challenges, it may be easier to meet in light of the categorical cases.

In *Solem*, Justice Powell suggested that, "[i]f more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive."¹²³ At a minimum, the nonhomicide-is-different factor—which after *Graham* is no longer limited to death penalty cases—suggests that a court examining a severe penalty given for a drug, property, or other non-violent crime should pay particular attention to how this jurisdiction punishes minor homicide crimes. And in evaluating which penalties are "less serious," any term-of-years penalty must be deemed constitutionally less severe than LWOP and especially mandatory LWOP.

2. Inter-jurisdictional comparisons (*Solem-3*)

In deciding whether the punishment at issue is excessive, Justice Powell stated that, "courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions."¹²⁴

Although the Court has never made the connection explicit, the third *Solem* factor bears some resemblance to the "national consensus" prong of categorical analysis. At some point, if the Court wishes to further consolidate its Eighth Amendment jurisprudence, it may make this connection explicit, deleting the second *Solem* factor (intra-jurisdictional comparisons, which has no counterpart in categorical analysis), and applying similar inter-jurisdictional comparison standards to both categorical and as-applied challenges.

With or without such consolidation, the Court's recent applications of its

¹²² See *Ewing*, 538 U.S. at 43–47 (Breyer, J., dissenting); *Harmelin v. Michigan*, 501 U.S. 957, 1025–27 (1991) (White, J., dissenting).

¹²³ *Solem v. Helm*, 463 U.S. 277, 291 (1983).

¹²⁴ *Id.*

national consensus assessments suggests reduced emphasis on that factor in categorical challenges—and thus, perhaps, also in as-applied challenges. As was noted in Part I, Justice Kagan's *Miller* opinion delayed this assessment so that it followed rather than preceded the court's "independent judgment." And in *Miller* and other recent cases, the Court has been willing to find "consensus" support for that judgment despite evidence that the challenged penalty was endorsed and applied in many other jurisdictions.¹²⁵ If this softening is carried over to as-applied challenges, it would mean that severe penalties would not have to be (as the penalty was in *Solem*) more severe than would be imposed in any other jurisdiction.

In both *Graham* and *Miller*, the apparent softening of the national consensus assessment was facilitated by the Court's observation that the challenged penalty may have resulted from an unforeseen interaction of separate juvenile-waiver and adult-sentencing rules. The Court concluded that if the challenged penalty does not necessarily reflect "deliberate, express, and full legislative consideration,"¹²⁶ there is less reason for the Court to defer to the legislature. A similar argument may sometimes also be available in adult as-applied cases, for example, where a severe mandatory-minimum penalty interacts with broad conspiracy- and accomplice-liability rules, making a minor participant fully liable for unintended crimes that grew out of the intended crime.¹²⁷

CONCLUSION

Perhaps the *Graham* and *Miller* decisions have little or no implications for adult sentencing because "children are constitutionally different."¹²⁸ Then again, perhaps these cases mark the beginning of a pendulum swing back toward at least some degree of Eighth Amendment regulation of extreme adult prison sentences. Rather than overrule the severe limits that the *Harmelin* and *Ewing* pluralities put on the three-factor *Solem* test, maybe the Court has found a precedent saving work-around, shifting to a categorical approach that actually provides meaningful constitutional protection. And given the administrative burdens, inconsistent results, and inevitable under-breadth of as-applied adjudication, categorical

¹²⁵ *Miller v. Alabama*, 132 S. Ct. 2455, 2487–91 (2012) (Alito, J., dissenting).

¹²⁶ *Id.* at 2473 (majority opinion) (quoting *Graham v. Florida*, 130 S. Ct. 2017, 2026 (2011)).

¹²⁷ The best-known example of broad liability of a secondary party for additional crimes committed by a co-offender is the rule in *Pinkerton v. United States*, 328 U.S. 640, 648 (1946) (stating that all conspirators are liable for any crime committed by a co-conspirator in furtherance of the conspiracy, unless that crime "could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement"). Some accomplice liability rules also sweep quite broadly, see, e.g., *People v. Beeman*, 35 Cal.3d 547, 560 (1984) (An accomplice is liable for any further crimes that are the "natural and reasonable consequences" of the crime the accomplice intentionally aided and abetted.); *People v. Kessler*, 315 N.E.2d 29, 32 (Ill. 1974) (An accomplice is liable for "any criminal act done [by another party] in furtherance of the planned and intended act.").

¹²⁸ *Miller*, 132 S. Ct. at 2464.

analysis is arguably the better approach anyway.

But even if the Court recognizes little if any extension of categorical analysis beyond the death penalty and juvenile LWOP, the “different” factors recognized in those cases, which the Court felt required over-broad categorical bans, may make it easier for defendants to successfully raise as-applied challenges under the *Solem-Harmelin-Ewing* standards. Each of the recognized “different” factors (and perhaps others not yet formally recognized) reflects a heightened risk of disproportionality. When one or more of those factors is present it should add substantial support to a defendant’s as-applied challenge.